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DISTRICT OF UTAH

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROBERT WILLIAM MONTGOMERY,
Defendant.

MEMORANDUM DECISION AND
ORDER GRANTING
GOVERNMENT'S MOTION FOR
UPWARD DEPARTURE AND
DENYING DEFENDANT'S MOTION
FOR DOWNWARD DEPARTURE

Case No. 2:03-CR-801 TS

This matter is before the Court on the government's Motion for Upward Departure, pursuant to USSG § 5K2.1 . Both parties have fully briefed the Motion, and a hearing was held thereon on June 10, 2004. At the hearing, the Court heard testimony from witnesses and arguments from counsel. At the conclusion of the hearing, the Court took the matter under advisement. Having fully considered the evidence before the court, the arguments of counsel, the pleadings and the file, and being otherwise fully informed, the Court will hereby GRANT the government's Motion for Upward Departure and depart upward two levels. Defendant will be sentenced at an offense level of 21 and a criminal history category of IV.

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Also before the Court is Defendant's Motion for Downward Departure, pursuant to USSG § 5K2.0. Both parties have briefed Defendant's Motion. Having reviewed the pleadings and the file and being otherwise fully informed, the Court will hereby DENY Defendant's Motion for Downward Departure, as set forth below.

BACKGROUND

On October 8, 2003, Defendant was indicted on a single count of Felon in Possession of Firearms and Ammunition. On February 18, 2004, Defendant pleaded guilty to the charge.

The government made its Motion on April 15, 2004, arguing that Defendant should receive an upward departure of four levels because "death resulted" – the suicide of Defendant's wife (Ms. Cottam-Montgomery) using Defendant's gun, aggravated by other factors, discussed below – from Defendant's illegal possession of firearms, within the meaning of USSG § 5K2.1. Defendant opposes the Motion, arguing that Ms. Cottam-Montgomery's suicide was not a "reasonably foreseeable" result of his illegal possession of the firearms and ammunition.

Defendant's Motion for Downward Departure was made as part of his Position of Party With Respect to Sentencing Factors Pursuant to Rule 310, filed April 26, 2004. The government responded on May 4, 2004. Defendant argues that the fact that he is the sole remaining living parent of his two-year-old son places this case outside the "heartland" of cases, warranting a downward departure from the otherwise-applicable guideline range. The government contends that USSG § 5H1.6 discourages such a consideration for downward departure, and that a downward departure is not otherwise warranted.

DISCUSSION

I. GOVERNMENT'S MOTION FOR UPWARD DEPARTURE

The Court has heard testimony and received evidence and finds that Ms. Cottam-Montgomery's death resulted from Defendant's illegal possession of a firearm, as a convicted felon, combined with the aggravating factors discussed below. Her death, and the circumstances surrounding it, represent aggravating factors not adequately taken into account by the sentencing guidelines, and which remove this case from the "heartland" of cases contemplated by the guidelines.

In determining the appropriateness of an upward departure, the Tenth Circuit has instructed that a court is to consider several factors, including: 1) whether the factors the court relied upon advance statutory objectives and do not violate any specific prohibition in the guidelines; 2) whether the factors relied upon are justified by the facts of the case, in other words, the "heartland" determination; and 3) whether the *degree* of departure is reasonable. United States v. Jones, 332 F.3d 1294, 1299-1300 (10th Cir. 2003).

USSG § 5K2.1 provides for an upward departure in the guideline range "[i]f death resulted" from the defendant's conduct. The plain language of § 5K2.1 requires that the conduct of the defendant resulted in the death of another. That section goes on to provide factors for the Court to consider in determining the *extent or degree* of such a departure, including "the dangerousness of the defendant's conduct, the extent to which death or serious injury was . . . knowingly risked, and the extent to which the . . . offense of conviction . . . already reflects the risk of personal injury."

The Court first rejects Defendant's argument that § 5K2.1 applies only to cases involving homicide. While the accompanying commentary lists, as one of a number of factors, homicide, the Defendant's reading of that reference as limiting this guideline solely to homicide cases is misplaced. Taken in context, the Court is to "give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation." The guideline goes on to mention "serious injury" and "personal injury," leading the Court to conclude that the § 5K2.1 applies just as its plain language reads – "[i]f death resulted." Homicide is not required.

Although the parties have argued various positions, it is undisputed that the relevant standard guiding the Court's determination here is reasonable foreseeability. The Tenth Circuit has explained that it has "interpreted the words 'resulted from' in the Guidelines as permitting 'an increased sentence for harms that were a 'reasonably foreseeable' consequence of a defendant's conduct' even where a defendant did not directly cause the specified harm." United States v. Fortier, 242 F.3d 1224, 1232-3 (10th Cir. 2001)(citing United States v. Metzger, 233 F.3d 1226, 1227 (10th Cir. 2000)). Defendant is responsible for the direct or indirect harm that arises from his violation of federal law – intended or not – so long as it is reasonably foreseeable. The Court finds that it was reasonably foreseeable, as that term has been defined in the caselaw, that such an outcome could result from Defendant's actions.

The purpose of the statute outlawing possession of weapons by convicted felons is to keep weapons and ammunition out of the hands of individuals which Congress has deemed have proven themselves unable or unworthy of their possession. Defendant's prior criminal history

includes two felonies and numerous misdemeanors, including assault against a police officer and carrying a concealed dangerous weapon.¹ Defendant has a demonstrated history of violence and firearms violations, combined with drug use.

Despite Defendant's arguments to the contrary, this is not simply a case of a felon in possession of a firearm whose wife committed suicide using his illegal weapon. There are aggravating factors and circumstances present in this case which, when considered in their totality, make the ultimate consequences of Defendant's behavior – the death of his wife – reasonably foreseeable as arising from his illegal behavior. Specifically, Defendant engaged in a pattern of escalating violence toward his wife, culminating in an incident just hours before her suicide. Testimony at the hearing, which Defendant did not deny or counter, shows that Defendant was emotionally and physically abusive toward his wife, and inflicted numerous physical injuries upon her. Defendant, more than any other person – as the perpetrator – was aware of this violence.

Further, Defendant was aware that his wife had attempted suicide, just three weeks before. The evidence before the Court shows that Defendant attempted to thwart his wife's efforts to receive treatment for her apparent depression, either from counseling or from taking medication, which he termed to be "crazy pills." Ms. Cottam-Montgomery's mother testified that Defendant directly told her – on his way home from the hospital after the suicide attempt – that his wife was not to take her medication. Defendant was uniquely aware of his wife's

¹ In addition, Defendant's juvenile record includes one felony and 16 misdemeanor convictions.

disturbed mental state, and of his direct and violent aggravation of it, and of her recent suicide attempt. Those factors, combined with his threat, immediately prior to Ms. Cottam-Montgomery's suicide, to take the couple's son away from her, created a potent and volatile mixture, ripe for tragedy.

The Court notes the inherent dangerousness of the combination of factors just listed. Extending the Tenth Circuit's analysis in Metzger, the Court finds that the violent nature of Defendant's physical abuse of his mentally fragile wife, his denial of the proper psychiatric treatment and attention she needed, and his knowledge of her recent suicide attempt, combined with his possession of multiple illegal weapons and ammunition in the home, "carries with it the inherent prospect that someone could be injured . . ." Id. at 1228. Given the inherently dangerous nature of the totality of Defendant's actions, the Court finds that it was reasonably foreseeable that Ms. Cottam-Montgomery might suffer serious injury or death as a result of his illegal possession of weapons in his home.

Defendant focuses on the fact that witnesses testifying at the hearing did not foresee or expect Ms. Cottam-Montgomery's suicide, therefore concluding that it is not reasonably foreseeable that Defendant would have expected it, or "knowingly risked" that it could happen. However, whether *others* could reasonably foresee the consequences of Defendant's actions is *not* the test. Defendant, as noted above, had a superior amount of knowledge and a unique perspective of the circumstances leading up to his wife's death. He alone is the person who could have "reasonably foreseen" or "knowingly risked" her death by his actions.

Applying the factors set forth in Jones, the Court further finds as follows:

First, an upward departure in this case, pursuant to USSG § 5K2.1, advances the objectives set forth at 18 U.S.C. § 3553(a). Specifically, this departure reflects the seriousness of the offense, promotes respect for the law, provides just punishment for the offense, and affords adequate deterrence to criminal conduct. Further, not only is there no prohibition against such a departure in the guidelines, to the contrary, the consideration of resulting death from offense conduct is an “*encouraged*” factor. Therefore, its application does not violate any policy or prohibition contained in the statute or the guidelines.

Second, 18 U.S.C. § 3553(b) provides that a “court shall impose a sentence of the kind, and within the [guideline] range, . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the” sentencing guidelines. The statute further directs that “[i]n determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the” sentencing guidelines, unless none is present. In this case, there is an applicable guideline, which the Court has invoked, and the Court has made the finding that Ms. Cottam-Montgomery’s death by means of the use of Defendant’s illegally possessed firearm represents precisely the aggravating circumstances referred to. This Court has never been presented with facts such as these, and the absence of caselaw directly on point further illustrates how unique this case is. This upward departure is justified by the facts of this case, as the circumstances presented by this case place it squarely outside of the “heartland” of typical cases involving a felon in possession of a firearm.

Third, the Court has weighed the evidence and all applicable factors and considerations in making its determination to upwardly depart. It has carefully considered the degree to which Defendant's actions make him additionally culpable, and the relative effects of his actions. The aggravating circumstances surrounding Ms. Cottam-Montgomery's death and their relation to Defendant's illegal firearms possession warrant a departure sufficient to provide increased punishment for such a drastic and tragic result – one that is certainly not anticipated within the framework of USSG § 2K2.1.² The Court finds that an upward departure of two levels accurately and fairly reflects Defendant's actions and is rationally related to the circumstances in this case.

II. DEFENDANT'S MOTION FOR DOWNWARD DEPARTURE

Defendant makes a Motion for Downward Departure pursuant to USSG § 5K2.0 based upon the fact that he is the “sole remaining living parent of his two year old son . . .” and the hardships resulting therefrom. Defendant argues that the custody of his son “is the subject of an ongoing domestic battle. The Defendant's unavailability to appear in court has precluded him from asserting his parental rights and his incarceration in prison would be a detriment both to those parental rights and to the health and well being of his two year old son, Jake” and, further, that “a substantial prison sentence would essentially see to it that this two year old has no access to either parent during this critical time in his life.”

² The cross-section to § 2K2.1 deals only with homicide. However, the circumstances presented by this case – suicide of another – is not considered in determining a guideline range under § 2K2.1.

The Court acknowledges its authority to depart downward in cases where the circumstances presented are of a kind or to a degree not adequately considered by the sentencing guidelines, pursuant to § 5K2.0. However, USSG § 5H1.6 states that “[f]amily ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.” The Court finds that the unfortunate fact that Defendant is now his son’s only living parent is not extraordinary to a degree that would warrant a downward departure. Many defendants appearing before this Court are faced with similar familial circumstances. Given that Defendant’s argued grounds are *discouraged* under the guidelines, the Court finds that this case is not outside the “heartland” of cases contemplated by the sentencing guidelines. Therefore, Defendant’s Motion for Downward Departure is DENIED.

CONCLUSION

Based upon the above, it is hereby

ORDERED that the government’s Motion for Upward Departure is GRANTED and the Court will depart upward two levels, pursuant to USSG § 5K2.1; it is further

ORDERED that Defendant’s Motion for Downward Departure is DENIED; it is further

ORDERED that sentencing on this matter be held on July 12, 2004 at 1:30 p.m.

SO ORDERED.

DATED this 22nd day of June, 2004.

BY THE COURT:



TED STEWART
United States District Judge

United States District Court
for the
District of Utah
June 22, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cr-00801

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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